

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DALLAS SOUTH MILL, INC., et al.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	CIVIL ACTION NO. 3: 05-CV-1890-B
	§	ECF
KAOLIN MUSHROOM FARMS, INC.,	§	
et al.,	§	
	§	
Defendants.	§	
	§	

MEMORANDUM ORDER

Before the Court is Defendants Kaolin Mushroom Farms, Inc., South Mill Mushroom Sales, Inc., John Pia, Michael Pia, Mark Moran, and Brian Zary's Motion to Dismiss Plaintiffs' First Amended Complaint (doc. 121), filed March 28, 2006. In their Motion, Defendants ask the Court to dismiss Plaintiffs' Amended Complaint by incorporating all the reasoning included in their Motions to Dismiss Plaintiffs' Original Complaint. (Defs. Mot. p. 3) Defendants also assert that Plaintiffs did not seek leave to amend their Complaint, and thus, the Court should not consider it. (*Id.* at p. 2) To the extent Defendants assert the Amended Complaint was filed without leave, the Court **DENIES** their Motion. The Court will, however, consider Defendants' argument in their initial Motions to Dismiss as applied to Plaintiffs' First Amended Complaint.

Rule 15 of the Federal Rules of Civil Procedure permits one amendment of a pleading without leave of Court at any time before a responsive pleading is served. Here, Defendants had filed Motions to Dismiss and Motions to Stay at the time Plaintiffs amended their Complaint, but the Fifth Circuit is clear that a motion to dismiss is not considered a "responsive pleading" under Rule

15 that would cut off the right to amend. *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 315 (5th Cir. 2004). Defendants' citation to a footnote of an unpublished district court case in support of their argument is neither persuasive nor binding. As such, the Court follows the Fifth Circuit, and **DENIES** Defendants' Motion to the extent they seek dismissal due to Plaintiffs' amendment of their Complaint without leave of Court. The Court will, however, apply the arguments contained in Defendants' original Motions to Dismiss to Plaintiffs' First Amended Complaint.

SO ORDERED.

SIGNED March 29th, 2006



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE